

On Flags, Borders and Crimes

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I like flag trivia. In case you do, too: Did you know that Turkmenistan has probably the most forgery-proof flag in the world? On a bright green background, there are: 1 white crescent, 5 white stars, 1 vertical red bar, on its bottom 2 crossed golden olive branches and above it 5 traditional Turkmen carpet patterns. Sensational!

Did you know how risky it is to use the flag of Saudi Arabia as a country symbol? It is not just a flag, it also contains words: ##### (God is the only God, and Mohamed is his prophet). In 2007, the US military in Afghanistan [handed out footballs to children](#) with flags printed on them, including the Saudi flag – which basically would mean kicking the Islamic creed back and forth. Not a good idea, obviously. For the same reason, the Saudi flag must never be raised half-mast.

Opprobrious mischief

This week a [law came into force](#) in Germany that threatens anyone who destroys or damages a flag of a foreign state in public "and thereby denigrates it" (§ 104 of the German Penal Code *Strafgesetzbuch/StGB*). What is remarkable about this law, apart from its blatant constitutional dubiousness – a point already made by [Justin Collings](#) a few months back –, is the fact that hardly anyone in Germany seems to care much at all.

Up to now, § 104 StGB forbade tearing down, destroying and doing "opprobrious mischief" (*beschimpfenden Unfug*) to flags of foreign states in an official context – a criminal norm with which law professor Dietrich Murswiek, later known as Peter Gauweiler's counsel before the Bundesverfassungsgericht and a prominent eurosceptic public voice, might have come into conflict with in his [youthful days of deutschnational activism](#) if the Federal Republic had maintained diplomatic relations with the GDR in 1970 (§ 104a StGB).

The flag-destroying offense, along with the adorably frumpish "opprobrious mischief" phrase, has its roots in the authoritarian Wilhelmine Germany of the late 19th century. "Whoever maliciously takes, destroys or damages a public emblem of authority of a state not belonging to the German Reich or a sovereign sign of such a state, or commits opprobrious mischief against it, is punished with a fine of up to six hundred marks or with imprisonment for up to two years," was stated in § 103a of the [Reich Penal Code](#) of 1876. Opprobrious mischief could otherwise be committed in a punishable manner in churches (§ 166) or "at a grave" (§ 168) or one could resort to "gross mischief" (*grober Unfug*) according to § 360 No. 11, also known as "boyish street mischief" (*bubenhafter Straßenunfug*), which lives on to this day in the form of "harassment of the general public" (§ 118 OWiG), albeit only as an administrative and not as a criminal offence.

The norm has been changed and adapted, but in essence it has survived the changing times. To which end? Well, after all, even a liberal democratic constitutional state such as the Federal Republic of Germany has a legitimate interest in undisturbed diplomatic relations, and measured against that, it does not seem to me to be disproportionate from the outset to threaten with punishment whoever wants to tear down flags from embassy flagpoles, in case that even actually happens anywhere ever.

Matter of opinion

But what has now been inserted into the penal code is a whole different ballgame: it is no longer about the flag as the image which a state hangs out from a flagpole of itself, but about the flag as the image that people make of it: pieces of cloth and cardboard, mail-ordered or self-painted, by holders of basic rights who display the symbol to make a statement about the symbolised.

The old § 104 StGB was not directly about opinion. Whoever destroys a flag, whether for political reasons or "boyish street mischief", is punished for that and not for the opinion expressed or not expressed by it. With the new § 104 sentence 2 StGB, this is different: What is penalized is that you destroy "and thereby denigrate" the flag. You denigrate, and that's what you get punished for.

There is another offense in the StGB (§ 90a): "Denigration of the state and its symbols": This is about denigrating the symbols of the very state whose basic rights I am claiming while doing so. A similar penal norm has now also been introduced for the flag and anthem of the European Union (§ 90c StGB). According to the [Federal Constitutional Court](#), protecting the federal flag in this way can be justified: "As a liberal state, the Federal Republic of Germany ... depends on its citizens' identification with the basic values embodied in the flag. The values protected in this sense are reflected in the state colours prescribed in Article 22 of the Basic Law. They stand for the free democratic basic order."

A similar argument could arguably be made, *mutatis mutandis*, for the EU flag, and with utmost difficulty, given the founding history of the Federal Republic, perhaps even for the Israeli flag the [burning of which at anti-Israel demonstrations](#) was a principal reason for the legislation. But if I denigrate the symbols of *just any* foreign state, there is no trace of a performative self-contradiction by making use of the very rights you are denigrating. On the contrary. People who do this most likely have fled from the state they are denigrating through its flag. And they fled to a place where they are protected by the Basic Law.

Looking outward from Germany

Let's say I'm a Turkmen who has escaped the henchmen of *Turkmenbashi* Saparmurat Niyazov in the 1990s. Maybe I was a news anchor there and was forced to swear an oath in every broadcast that [my tongue would shrivel if I ever slandered my country, my president or my flag](#).

Or let's say I am a Saudi having escaped the grip of the al-Saud princes and their minions, who rule the country which bears their family name with unbridled power and fly the Islamic creed plus a bare sword over it as the national flag.

So, here I am in Germany, in safety and under the protection of the Basic Law and of freedom of expression and the right of asylum. Here I am, being told that burning the *Turkmenbashi* flag is considered a crime rather similar to burning the German flag. Here I am in Germany, under conditions of democracy and freedom of expression, but being punished if I take a lighter to the flag hoisted above me and my country by usurpers, autocrats, torturers and gangster bosses.

We Germans have one of the most valuable and sought-after citizenships in the world. This is actually a great injustice, but that's the way it is. We don't need to flee anywhere (for the time being at least, praise be). We sit here in our comfortable country and look lazily at all those places around which Donald Trump with disarming openness likes to call "shithole countries". We are quickly satisfied with culturalist and essentialist pseudo-explanations of why they are so much worse off than we are. We see all around us opaque, strange entities full of opaque, strange problems which we condescendingly commiserate with while trying to keep them at safe distance as "internal affairs" of states whose reputation appear to us as perfectly plausible legal interests worthy of protection against "denigration", no matter who we are actually dealing with.

We see the people demonstrating in front of their embassies, we see their anger and their grief, and sometimes we find them annoyingly noisy, being only guests and all. With that § 104 law, all we intended was demonstrating our unswerving commitment to Israel's right to exist, and if in doing we criminalized a whole form of protest, we actually could care less. We have no clue, and we don't care. It's only foreigners anyway.

But it is *our* freedom of opinion. And the fact that it exists and is protected in Germany is ultimately the reason why people flee to us and not vice versa. The Basic Law categorically prohibits laws that are intended to suppress specific opinions because of their undesirable content. If you regulate free speech, it has to be with a "general law" according to Art. 5 para. 2. If the new offense in § 104 StGB had been only about the Israeli flag it would have been highly debatable if it was in fact a "general law". Even so, the prohibition of this form of protest must be proportional to the legal interest it protects. Avoiding diplomatic trouble with, say, China by criminalizing hypothetical flag-burning exile Uyghurs does not strike me as an exact no-brainer in that respect. If China objects we could also simply point out to China that this, unlike China, is a free country.

Why was this necessary? After all, there don't seem to be all that many cases of flag burnings in Germany in the first place. It is possible that this new § 104 p. 2 StGB will remain a mostly symbolic norm without cases, abstract and fluttering in the wind like a flag. A symbol. Symbols matter, though. They mean something.

The week on Verfassungsblog

... summarized by LENNART KOKOTT:

In Germany and elsewhere, last week brought an **increase in the number of Covid-19 cases**, which in some places reached worrying levels. The local outbreaks in meat industry factories in North Rhine-Westphalia underlined the particular dynamics of the pandemic, which sometimes pushes traditional categories of regulatory law to their limits, writes [CHRISTOPH GUSY](#), showing what conclusions can now be drawn for a law that learns. CHARLOTTE HEPPNER talked to MICHAEL WINKELMÜLLER in [Corona Constitutional #38](#) about the regulatory framework in the meat industry and social responsibility for the recent occurrence of infections there.

While the extensive relaxation of the containment measures is being discussed anew in the light of the increasing number of new infections, **politics** has not yet left the **corona mode** at all. THORSTEN KINGREEN and CHARLOTTE HEPPNER discussed the implications of this circumstance for our understanding of democracy and separation of powers in [Corona Constitutional #37](#).

Meanwhile, [SEBASTIAN WOLF](#) approaches the pandemic using Carl Schmitt's categories and concepts **beyond the state of emergency** and discovers some applications for Schmitt's political theology.

The pandemic was also accompanied by hate and conspiracy theories on a frightening scale online. But by no means only since the beginning of the pandemic politicians and socially engaged people are exposed to **hate on the internet**. [MATHIAS HONG](#) draws conclusions for the relationship between freedom of opinion and privacy rights online from four chamber decisions of the Federal Constitutional Court and welcomes the fact that the court took the initiative to decisively dispel misconceptions about its caselaw in this context. [NORA WIENFORT](#) deals with a decision of the French *Conseil Constitutionnel*, which declared the French law against hate crimes on the Internet to be unconstitutional in large parts, and also looks at the consequences for the German network enforcement law as well as discussions about a European regulation.

[THOMAS FELTES](#) underlines why **police officers** exercise a highly sensitive profession in terms of fundamental rights and why it is absolutely necessary to be able to criticise them in this exercise. At the same time, it is of the essence to establish a different and psychologically informed culture of dealing with errors and of support within the police force in order to alleviate the hardships for police officers, which the profession undoubtedly imply, in order to act preventively, he says.

In the debate about **tougher penalties** in the field of child sexual abuse, too, polemic is no rarity. In [Corona Constitutional #36](#), CHARLOTTE HEPPNER spoke with ANNE-KATRIN WOLF about demands for legislative action and what would

actually help to better protect children from sexual abuse: in particular, more safe places and services for people threatened by or subject of violence.

[LINA GÁLVEZ MUÑOZ, AGNÈS HUBERT and RUTH RUBIO MARÍN](#) present an appeal that focuses on the **rights of women** in the pandemic and calls on the European institutions to actively address the inequalities that the crisis is not only perpetuating but exacerbating. The time has come to work towards a new and gender-equitable social contract, they say.

Around the PSPP ruling of the Federal Constitutional Court, there was repeated talk from various quarters about the **European *Rechtsgemeinschaft*** (legal community). [THORBEN KLÜNDER](#) examines the concept of the legal community from the perspective of legal history and legal theory and shows the extent to which it has become a *Grundbegriff* (basic concept) of European law – and why open-ended legal doctrine should dispense with it precisely for this reason.

In the extended European legal area, the problem of non-compliance with European judgments by national courts has been arising for some time now. This problem is similar to the current dispute between the ECJ and the Federal Constitutional Court, writes [CARL BAUDENBACHER](#) on the subject of Norway's confrontational approach towards the **EFTA Court**.

A potential **problem with the rule of law in Germany** has arisen for the Erfurt Regional Court, which, on the occasion of a ruling on tort claims against Volkswagen in the diesel scandal, submitted to the ECJ the question of whether the German judiciary was independent enough in view of a judicial structure dating from pre-democratic times, [MAXIMILIAN STEINBEIS](#) reports.

In the case of **Hungary**, the lack of the rule of law is a well-known fact. [PETRA BÁRD, JOELLE GROGAN and LAURENT PECH](#) analyze the ECJ ruling on the Hungarian NGO law and present possible reactions of the Hungarian government. Despite the clear ruling, the prospects are bleak, they say, because the time for effective resistance against Orbán's authoritarianism might have been missed by the European actors.

Judgments of courts whose normative power is constantly diminishing in a backsliding democracy should not be analysed dogmatically. This would legitimize the strategy of autocratic legalism of such regimes, whereas court decisions in such contexts are more performative acts than reasons, writes [ANDRÁS JAKAB](#) and elaborates on the **methodological challenges of autocratization** for jurisprudence.

[LASSE SCHULDT](#) deals with the legal debate about fake news in the **Philippines**. A recent judgement of a regional court in Manila makes it clear that the freedom of the press in the country is endangered by hardly fulfillable demands on journalists, while no action is taken against falsehoods in statements issued by government.

[GARETH DAVIES](#) examines the responsibility of universities in safeguarding academic freedom and protecting research and teaching in this context by example of the case of [DIMITRY KOCHENOV](#) recently presented on Verfassungsblog.

A disagreement between the Latvian Constitutional Court and the Venice Commission on the issue of minority languages in school education highlights the **relationship between minority rights and public discourse** in liberal democracy, writes [ALEKSEJS DIMITROVS](#).

So much for this rather exciting week. This is the season where many of you decide to continue your [Steady](#) support for another year. Which is great! We really appreciate your continued support (very few cancel), in fact we wouldn't know how to make ends meet without you. Many thanks!

All best

Max Steinbeis

